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IN THE

Supreme Court of the United States

October Term, 1935

No.....

A. L. SHAPLEIGH, et al,

Petitioners,

vs.

PASCUAL MIER.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION

A. L. Shapleigh and others, plaintiffs in the Trial Court, through their counsel, pray that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Fifth Circuit, entered in the above cause on April 30, 1936, affirming the decision of the District Court of the United States for the Western District of Texas.

STATEMENT

This is a suit in trespass to try title for the recovery of a tract of land known as El Guayuco Banco, containing 136.6 hectares or 337.6 acres, lying on the bank of the Rio Grande River in Hudspeth County, in the El Paso Division of the Western District of Texas. Plaintiffs contend that El Guayuco Banco was cut from Mexico by an avulsive

change in the course of the Rio Grande some time in the year 1926, as found by the International Boundary Commission by its minute No. 121, promulgated March 3, 1930 (R. 9), and that it was cut from La Santisima, a tract of about 95,000 acres, located in the State of Chihuahua, Mexico, to which plaintiffs had title by a chain beginning with the confirmation by the President of Mexico in 1864, of a grant by the Legislature of the State of Chihuahua in 1859 to Laureano Munoz (R. 19), and running down by successive transfers to a deed dated February 13, 1897, by Bennett H. Davis to A. L. Shapleigh, Charles H. Peck and Thomas Ranken, Jr. (R. 114), and that the plaintiffs other than A. L. Shapleigh are the successors in title of Charles H. Peck and Thomas Ranken, Jr. In addition, plaintiffs pleaded the Mexican Statutes of Limitation of ten years in good faith and twenty years in bad faith. (R. 423). Defendant's title is based on a proceeding whereby the Governor of Chihuahua, on March 5, 1925, undertook to expropriate La Santisima (R. 253), and an instrument dated February 20, 1930, whereby the Governor of Chihuahua attempted to convey El Guayuco Banco to the defendant (R. 276). A stipulation in writing waiving a jury was filed. At the trial, all of the documents claimed by the parties to constitute their muniments of title were admitted in evidence over objection, and translation of all Mexican law offered by either party was admitted in evidence without objection as to accuracy of translation, and will be found in the record. The uncontradicted evidence showed that payment for the land so taken was never made or tendered (R. 382, 387). The District Court found that plaintiffs had good record title to the land in controversy when the Mexican Constitution providing for an Agrarian Law and expropriation proceedings was adopted on May 1, 1917 (R. 434); that the plaintiffs never had title by limitation (R. 440); that the expropriation proceedings culminating in the decree of the Governor of Chihuahua of March 5, 1925,

were valid and divested plaintiffs of their title (R. 438); that payment for land expropriated for public use in Mexico is not required to be made in advance or at the time of such expropriation (R. 439); that claim for compensation for land expropriated under the laws of Mexico must be sought through the Courts of Mexico or if sought by foreigners, may be sought through the political department of their government (R. 440); that the petition of the defendant, dated March 14, 1925, directed to the Governor of the State of Chihuahua asking that defendant be awarded a portion of the tract called La Santisima, created a vested interest in the applicant (R. 440); that the portion of La Santisima called El Guayuco Banco was cut from Mexico to the United States some time in the year 1926 (R. 437); and it was the judgment of the Court that the plaintiffs recover nothing and the defendant go hence (R. 433). The Circuit Court of Appeals sustained the judgment of the District Court (R. 456).

QUESTIONS PRESENTED

1. Was the expropriation proceeding valid whereby the Governor of the State of Chihuahua, Mexico, took from plaintiffs their land there located, valid record title to which the District Court held was at the time in them, a portion of such land being afterward shifted into the United States by an avulsive change in the course of the Rio Grande, constituting the boundary between the two countries, and being here the subject of controversy?

2. Could the Governor of the State of Chihuahua, Mexico, lawfully take from American owners their land located in that State, without indemnification?

3. Could the Governor of the State of Chihuahua, Mexico, lawfully convey title to land which, at the time of the attempted conveyance, was in the United States?

SPECIFICATION OF ERRORS

The Circuit Court of Appeals erred:

1. In holding that the District Court correctly directed judgment for the defendant.

2. In holding that the expropriation proceeding of the Governor of Chihuahua, Mexico, was effective to divest plaintiffs of their title to the land in question.

3. In holding that plaintiffs could lawfully be deprived of their Mexican land without indemnification.

4. In holding that the Governor of Chihuahua, Mexico, could lawfully convey to the defendant title to land located in the United States at the time of such attempted transfer.

5. In holding that in a suit to recover title to and possession of land now in the United States, formerly in Mexico, plaintiffs' only remedy is a suit in the Courts of Mexico for compensation for the loss of the land.

6. In holding that the Courts of the United States may not inquire into the validity of a Mexican expropriation proceeding whereby American citizens are deprived of their Mexican land without compensation.

7. In holding that in a trespass to try title suit, such as this, the validity of plaintiffs' title is ever relatively unimportant, because if the defendant should prove to be a trespasser the plaintiff may recover on a mere showing of prior possession.

8. In holding the principle that the law goes with the land when it is transferred from one sovereignty to another has no application to the transfer by the movement by the river of a few acres of land from one sovereignty to another.

9. In holding that the Mexican Law and its application

to this case was a question of fact and rightly disposed of as such by the District Judge.

10. In holding that land located in the United States may be recovered by diplomatic proceedings.

11. In holding that the defendant connected himself with the title of the State of Chihuahua to the land in question by an inchoate grant.

REASONS FOR GRANTING THE WRIT

1. The effect of the holdings of the District Court and the Circuit Court of Appeals is to relegate the plaintiffs to the Courts of Mexico or to diplomatic channels. Here we seek the land itself, not compensation for the loss of it. The land is in the United States, therefore the Courts of Mexico are without jurisdiction. The determination of the title to land in the United States is confined exclusively to the Judicial Department of the Government. Therefore, it would be futile to ask relief through diplomatic channels. The result is that plaintiffs are without a remedy, which is contrary to the fundamental law of the land. Such a situation calls for an exercise of this Court's power of supervision as provided for in Rule 38 of this Court.

2. This Court and many other Courts, both State and Federal (a list will be found in the supporting brief at page 11) have examined into and passed upon the validity of acts of foreign governments, legislative, executive and judicial, and when the Circuit Court of Appeals says in this case that such action on its part is inhibited by *Oetjen v. Central Leather Co.*, 246 U. S. 297, and *Ricaud v. American Metal Co.*, 246 U. S. 305, there remains in doubt the proper interpretation of such cases, and there remains in doubt the rights of American citizens in foreign countries.

3. The Circuit Court of Appeals held that the interpreta-

tion by the District Court of the Constitution and Laws of Mexico resulted in findings of fact binding on it, and not in conclusions of law subject to review on appeal. The authorities, State and Federal, are in hopeless confusion on this point. The opinion of the New York Court of Appeals in *Bank of China vs. Morse,* 168 N. Y. 458, 56 L. R. A. 139, is to the contrary. Many authorities are there cited. Among them, a decision of this Court, *Hanley vs. Donoghue,* 116 U. S., page 1, 29 Law Ed. 535, 6 Supreme Court Reports 242. The opinion of the Circuit Court of Appeals for the Second Circuit in *Compania Transcontinental de Petroleo, S. A., vs. Mexican Gulf Oil Company,* 292 Fed. 846, seems to support the holding of the Circuit Court of Appeals in this case. However, we think the four decisions of this Court, cited by the Circuit Court of Appeals in this case, are against it, rather than in its favor. They are, *The Amelia,* 1 Cranch 1; *Pierce vs. Indseth,* 106 U. S. 551; *Liverpool Steam Co. vs. Phoenix Insurance Co.,* 129 U. S. 445; *Slater vs. Mexican National R. R. Co.,* 194 U. S. 121. But that only adds to the lack of harmony and should invite the interposition of this Court.

4. Under the holdings of the lower Courts American citizens may lawfully be deprived of their Mexican land without compensation. That is in conflict with International Law, the treaty between the United States and Mexico, the Mexican Constitution, and the Chihuahua Statute, and requires the intervention of this Court.

5. The Circuit Court of Appeals held the well-established doctrine that where land is transferred from one sovereignty to another the law follows the land has no application to a small acreage. We believe that to be an incorrect interpretation of *Fremont vs. United States,* 17 How. 556, and other decisions of this Court. It is a matter of far-reaching importance. It will affect every Banco case, of which there

will doubtless be many. The confusion should be clarified by this Court.

WHEREFORE, it is respectfully submitted that this petition should be granted.

J. F. McKENZIE,
H. R. GAMBLE,

Attorneys for Petitioners.

IN THE

Supreme Court of the United States

October Term, 1935

No.....

A. L. SHAPLEIGH, et al,

Petitioners,

vs.

PASCUAL MIER.

BRIEF IN SUPPORT OF PETITION

OPINIONS BELOW

The memorandum decision of the District Court (unreported) is in the record at page 428. Its findings of fact and conclusions of law (also unreported) are in the record at page 434. The opinion of the United States Circuit Court of Appeals (unreported) is in the record at page 456.

JURISDICTION

The judgment of the Circuit Court of Appeals affirming the judgment of the District Court was entered April 30, 1936 (R. 464). The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925.

ARGUMENT

I. The writ should be granted because the Circuit Court of Appeals committed reversible error in holding that it could not inquire into the validity of the Mexican expropriation proceeding whereby the plaintiffs lost the land in controversy.

The Circuit Court of Appeals said that the Courts must treat as valid governmental action within its domain by a foreign state, and in support of that conclusion cited *Oetjen vs. Central Leather Co.*, 246 U. S. 297, and *Ricaud vs. American Metal Co.*, 246 U. S. 303. The holding in those cases is the law only in similar situations. In both cases the act, the validity of which the American Court declined to examine, was the act of the commander of a revolutionary force, while actually engaged in warfare, in making a siezure for the purpose of defraying the expense of further hostilities, the revolutionaries being afterward recognized as the government *de jure*, and the seizure made was authorized by the Articles of War, and it was not contended that there was any authority for it under the civil law. It is not believed this Court intended the doctrine there pronounced to be extended beyond the facts there found. The fact situation here does not remotely resemble the one there involved. Here the seizure was made by a civil officer in time of peace, when the government was stable and under the guise of the authority of law and for the ostensible purpose of carrying out the provisions of the Mexican Constitution.

The Courts of the United States, both State and Federal, have many times examined the acts of foreign nations, and have frequently held them invalid in protecting the rights of American citizens abroad. For example, see the following cases:

United States vs. Arredondo, 6 Peters 691, 748;
United States vs. Percheman, 7 Pet. 117;
Delassus vs. United States, 9 Pet. 117;
United States vs. Reynes, 9 Howard 127, 148;
Davis vs. Police Jury, 9 Howard 280, 289;
United States vs. Sutter, 21 Howard 170;
United States vs. Rose, 23 Howard 262;
Donaldson vs. Dodd, 12 Tex. 381, 394;
State vs. Bustamente, 47 Tex. 320, 322;
Kenedy Pasture Co. vs. State of Texas, 111 Tex. 200, 230.

Even the validity of a foreign judgment will be examined by a local Court:

Hilton vs. Guyot, 159 U. S. 113, 40 Law Ed. 95;
Banco Minero vs. Ross, 172 S. W. 711;
San Lorenzo Title & Improvement Co. vs. City Mortgage Co., 48 S. W. (2nd) 310;
San Lorenzo Title & Improvement Co. vs. Clardy, 48 S. W. (2nd) 315;
San Lorenzo Title & Improvement Co. vs. Caples, 48 S. W. (2nd) 329;
Willis vs. First Real Estate & Investment Co., 67 F (2nd) 671.

It seems preposterous that defendant can set up as his sole source of title the expropriation decree, and in the same breath say this Court cannot inquire into its validity because it is the work of a foreign nation. Defendant should be estopped to take that position; since he offers the expropriation decree, good faith requires that it should be subject to the scrutiny of the Court.

II. The writ should be granted because the Circuit Court of Appeals committed reversible error in holding that it was bound by the Trial Court's interpretation of Mexican Law.

The Circuit Court of Appeals said:

> "We are of the opinion that the Mexican law and its application to this case was a question of fact and rightly disposed of as such by the District Judge, if he had any right to go into the question at all. We are bound by his findings."

It is well settled that foreign law must be proved as a fact, but it is consistent with the weight of authority that the interpretation of foreign law and its application to the facts of the case on trial are for the Judge and are matters of law, subject to review on appeal.

The New York Court of Appeals in *Bank of China, et al. vs. Morse*, 168 N. Y. 458, 56 L.R.A. 139, said:

> "That, when it becomes necessary to establish the law of a foreign country, it must be proved, as facts are proved, there is no doubt; but when, after such proof is given, the questions involved depend upon the construction and effect of a statute or judicial opinion, we think those questions are for the court, and not questions of fact at all."

The Court cited the following authorities:

Chase's Stephen, Ev. 146;
Hanley vs. Donoghue, 116 U. S. 1, 29 L. Ed. 535, 6 Sup. Ct. Rep. 242;
Ufford vs. Spaulding, 156 Mass. 65; 30 N. E. 360;
Molson's Bank vs. Boardman, 47 Hun. 135; Story Confl. L. Sec. 638; 1 Greenl. Ev. Sec. 486;
Kline vs. Baker, 99 Mass. 253, 255;
Shoe & Leather Nat. Bank vs. Wood, 142 Mass. 563, 568, 8 N. E. 753.

Other authorities to the same effect are:

Inge vs. Murphy, 10 Ala. 885;
The State vs. Jackson, 13 N. C. 563;
Consequa vs. Millings, 6 Fed. Cases 336, 337 (Pet. C. C. 225, case No. 3128);
Williams vs. State, 11 S. W. 481;
Sidwell vs. Evans, 1 Pen. & W. 383, 21 Am. Dec. 387;
Alexander vs. Pennsylvania Co., 48 Ohio St. 623, 30 N. E. 69;
Wheeler vs. St. Paul Crushed Stone Co., 191 Ind. 75, 132 N. E. 1;
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Fourth Nat. Bank of Montgomery, Ala., vs. Bragg, 102 S. E. 649, 127 Va. 47, 11 A.L.R. 1034;
Tarbell vs. Grand Trunk Ry. Co., 118 A. 484, 46 Vt. 170, 34 A.L.R. 1444;
Saloshin vs. Houle (New Hampshire), 155 A. 47;
Scaly vs. Missouri, K. & T. Ry. Co., 114 P. 1077, 84 Kan. 879, 41 L.R.A. (N. S.) 500;
Osgood Co. vs. Wilkinson, 191 N. E. 779, 265 N. Y. 70.

The only Federal case we have been able to find which seems to be to the contrary is *Compania Transcontinental de Petroleo, S. A. vs. Mexican Gulf Oil Co.* (C.C.A. 2nd) 292 Fed. 846, and in our opinion the doctrine there laid down is not supported by the authorities cited.

In an earlier part of the opinion of the Circuit Court of Appeals in this case, it said in speaking of the law of Mexico:

> "It remains for the law to be proved as a fact when written by production of copies of the constitution and statutes, and in other respects by the testimony of experts. The writings are to be construed by the Judge as other writings in evidence, but if uncertain in meaning or application, evidence of experts is again admissible to aid construction."

That statement of the law is not very clear, but it is more nearly correct than the statement previously quoted and

which was followed by the Court. We believe that the cases cited by the Circuit Court of Appeals in connection with the foregoing quotation support our contention that the interpretation given by the Trial Court to foreign constitutions and statutes is matter of law subject to review on appeal. The cases are as follows:

The Amelia, 1 Cranch 1;
Pierce vs. Indseth, 106 U. S. 551;
Liverpool Steam Co. vs. Phoenix Ins. Co., 129 U. S. 445;
Slater vs. Mexican National R. R. Co., 194 U. S. 121.

In each of the foregoing cases, the Appellate Court gave its own interpretation to the foreign law involved.

III. The writ should be granted because the Circuit Court of Appeals committed reversible error in upholding the validity of the Mexican expropriation proceeding whereby the land in controversy was taken from the Plaintiffs.

The taking of plaintiffs' land was unlawful

A. Because the expropriation proceedings under which it was taken was invalid; and

B. Because the land was never paid for.

A. The expropriation proceeding was invalid

1. Because the Governor was without authority to conduct it;

2. Because only holdings greater than plaintiffs' were subject to expropriation; and

3. Because only the excess was subject to expropriation and plaintiffs' entire holdings were expropriated.

B. The failure to pay caused failure to divest title because:

1. Contrary to International Law;
2. Contrary to the treaty between the United States and Mexico;
3. Contrary to the Mexican Constitution; and
4. Contrary to the Chihuahua Statute.

A (1) As to the invalidity of the expropriation proceeding, a portion of Article 14 of the Mexican Constitution of 1917 is as follows (R. 399):

> "No person shall be deprived of life, liberty, property, possessions or rights without due process of law instituted before a duly created court, in which the essential elements of procedure are observed in accordance with previously existing laws."

The Governor of the State of Chihuahua was no kind of court. Therefore, he had no authority to expropriate.

A (2) Moreover, the Agrarian Law of the State of Chihuahua allows an individual to own a maximum of 40,000 hectares (R. 329) and a hectare consists of 2.47 acres. La Santisima embraced an area of 95,000 acres and the record title was in the name of three persons and it was, therefore, not subject to expropriation. (R. 91.)

A (3) But in any event, the entire holdings of the plaintiffs were not subject to expropriation, only the excess above the amount allowed by law to be held. That only the excess is to be taken is iterated and re-iterated in the Agrarian Law. It appears on pages 329, 330, 335 and 337 of the printed record and twice each on pages 331, 332, 333 and 334. In spite of the law, the Governor dispossessed the plaintiffs of their entire holdings. (R. 267.)

B (1) On the question of failure to pay causing failure to divest title, the expropriation of plaintiffs' land was, first, contrary to the principles of International Law, and established custom.

International Law is a part of the law of the land. Moore: *International Law Digest,* Volume 1, page 10; *The Nereide,* 9 Cranch 388. The rights of aliens in Mexico to real property is a subject of International Law. By that law a citizen of the United States cannot be deprived of property without due process of law, which requires the payment of just compensation. The attribute of sovereignty by virtue of which a nation takes private property for public use is known as "eminent domain". Vattel, in his *"Law of Nations",* Chitty's Edition, Book I, Chapter 20, page 112, states:

> "If the sovereign disposes of the public property by virtue of his eminent domain, the alienation is valid as having been made with sufficient power. When, in case of necessity, he disposes in like manner of the possessions of the community or an individual, the alienation will, for the same reason, be valid. But justice requires that this community or this individual be indemnified at the public charge; and if the treasury is not able to bear the expense, all the citizens are obliged to contribute to it; for the burdens of a state are to be supported equally, or in a just proportion."

In *Mead vs. United States* (2 United States Court of Claims Reports, pages 224, 275) it was held:

> "The right of the government to take for public use or public welfare the property of a citizen by virtue of the right of eminent domain, and the obligation to make compensation to the citizen for it, are universally admitted as concurrent and correlative powers and duties. They are co-existent and co-extensive."

The text writers on the subject lay down the same doctrine. *Mills on Eminent Domain,* Section 130, says:

"Payment must be made before entry, where the owner insists on this right. An entry without payment is a trespass."

Lewis on Eminent Domain, Third Edition, Section 681, says:

"Any interference with the rights of property is a taking. The occupation of property is clearly such an interference, and should not be permitted until the compensation is paid."

The general and established practice is obviously the same.

"It has long since become the well settled rule that property cannot be taken for public use without adequate compensation, even on the theory that it has been abandoned by the owner."

10 R. C. L., p. 124;
Pumpelly vs. Canal Co., 13 Wall. 166, 20 L. Ed. 557;
Garrison vs. New York, 21 Wall. 196, 22 L. Ed. 612;
United States vs. Great Falls, 112 U. S. 645, 5 Supreme Court 306, 28 L. Ed. 846;
Great Falls vs. Garland, 124 U. S. 581, 8 S. Ct. 631, 31 L. Ed. 527
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Monongahela Navigation Co. vs. United States, 148 U. S. 312, 13 S. Ct. 622, 37 L. Ed. 463;
Bauman vs. Ross, 167 U. S. 548, 17 S. Ct. 966, 42 L. Ed. 270;
Kennedy vs. Indianapolis, 103 U. S. 599, 26 L. Ed. 550.

"Any statute is unconstitutional which enables the donee of the power of eminent domain to take property without first paying compensation therefor in money."

16 Tex. Jur., p. 573;
Mud Creek Irr., etc. Co. vs. Vivian, 74 Tex. 170, 173, 11 S. W. 1078;
Shipley vs. Dallas County Levee Improvement Dist. No. 6, 233 S. W. 556, 561;

Barrett vs. Metcalfe, 33 S. W. 758.

It will thus be seen that International Law and Established Usage are in accord and forbid the taking of private property for public use without compensation.

B (2) The expropriation of El Guayuco Banco was in violation of the Treaty between the United States and Mexico.

The Government of Mexico, in entering into the Treaty of September 8, 1923, with the United States, recognized the rights of American citizens to receive just compensation for property expropriated before they could be divested of their legal rights.

By Article IX, second paragraph, of the Convention creating the General Claims Commission, it was provided:

> "In any case the commission may decide that international law, justice and equity require that a property or right be restored to the claimant in addition to the amount awarded in any such case for all loss or damage sustained prior to the restitution. In any case where the Commission so decides the restitution of the property or right shall be made by the Government affected after such decision has been made, as hereinbelow provided. The Commission, however, shall at the same time determine the value of the property or right decreed to be restored and the Government affected may elect to pay the amount so fixed after the decision is made rather than to restore the property or right to the claimant. In the event the Government affected should elect to pay the amount fixed as the value of the property or right decreed to be restored, it is agreed that notice thereof will be filed with the Commission within thirty days after the decision and that the amount fixed as the value of the property shall be paid immediately. Upon failure so to pay the amount the property or right shall be restored immediately."

This recognized, therefore, the right of the claimant, the plaintiff in the present case, to have his land back, unless Mexico elected to pay for it, in which case payment had to be immediate.

B (3) The failure to pay plaintiffs for their land taken was in violation of the provisions of the Mexican Constitution.

It seems to us that plaintiffs' rights should be determined by the provisions of the Mexican Constitution of 1857, since it was in effect at the time plaintiffs acquired title to the property in dispute in 1897. Article 27 of that Constitution provides that private property shall not be taken without the consent of the owner, "Indemnification having been made." (R. 397.) There can hardly be a shadow of a doubt that such language means previous payment, and that the owner does not lose his title until he gets his money. But if the Court should hold that we are to be governed by the provisions of the Constitution of 1917, the result would be the same. There is no substantial difference in the two constitutions in this respect. The Constitution of 1917, Article 27, says (R. 401):

> "Private property shall not be expropriated except for reasons of public utility and *by means of indemnification.*"

That both constitutions require indemnification before title passes, seems too clear to need the aid of construction.

B (4) A Statute of the State of Chihuahua forbids expropriation without compensation.

Article 736 of the Civil Code of the State of Chihuahua reads as follows (R. 91):

> "The property of any person cannot be occupied without the consent of the owner unless by cause of public utility and previous indemnification."

This point is probably unimportant except that a certain situation would arise which seems to us practically impossible, namely, that this Court should hold expropriation without indemnification in harmony with the Mexican Constitution. In that event the taking of our land would still be in violation of the State Statute and surely, it cannot be contended that the Mexican Constitution forbids such a Statute. If this Court should hold that the taking of our land without paying for it is in violation of the Mexican Constitution, the fact that it is also a violation of a Mexican State Statute simply emphasizes the rape of the plaintiffs.

Giving the most liberal interpretation to any authority that may be cited by defendant, it is confidently believed that no case can be found in the books which goes further than to hold that in the absence of payment of cash at the time of expropriation, there must be at least a guarantee of payment and if actual payment be not made within a reasonable time, title reverts to the owner. In this case there was no guarantee, and surely plaintiffs could not be expected to wait longer than ten years to get their title back, if they ever lost it.

In another of these so-called "banco" cases the Circuit Court of Appeals for the Fifth Circuit, in *Willis vs. First Real Estate and Investment Company,* 68 F. (2nd) 671, said:

> "The proceeding under which he (the defendant in this case) claims was a special one. No jurisdictional presumptions may be entertained in regard to it. The proof must show the jurisdiction. This is required of judgments and other official acts entered in special proceedings, even in domestic ones."

The expropriation decree of the Governor of Chihuahua was not a judgment of a court, but an ex parte administrative act. It was not a general law, but a special decree purporting to affect individual property. It was, therefore, a special proceeding, and must show compliance with the

Constitution and the Special Laws governing such proceedings. The burden was on the defendant to show the validity of the expropriation proceeding and he wholly failed to carry the burden.

Since the District Court was not bound by the interpretation given by the Mexican Courts to the Mexican Law, it should have followed this Court, which provided a perfect precedent.

The provision of the Indiana Constitution construed by the Supreme Court of the United States in *Kennedy vs. Indianapolis, supra,* is substantially the same as the provision of the Mexican Constitution here involved. It provided that no man's property should be taken or applied to public use "without the consent of his representatives, or without a just compensation being made therefor."

It will be observed the organic law did not specifically state whether indemnification should be previous, simultaneous, or subsequent. This Court said:

> "It seems to us that both on principle and authority the rule is, under such a constitution as that of Indiana, that the right to enter on and use the property is complete, as soon as the property is actually appropriated under the authority of law for a public use, but that the title does not pass from the owner without his consent, until just compensation has been made to him."

Only one other point need be considered. But we think that point is of the utmost importance. The deed conveying the land in controversy to the defendant was executed by the Governor of the State of Chihuahua February 20, 1930. (R. 277.) The land had passed to the United States four years previously, some time in 1926. (R. 437.) To cure this otherwise fatal defect, defendant claimed that his rights under the deed began with the filing of his petition,

March 14, 1925. Both lower Courts upheld that contention, we think without rhyme or reason. No authority was cited and none can be found. The holding was plainly contradictory to the language of both instruments. Neither the application (R. 269) nor the acknowledgment of its receipt (R. 273) purport to vest any rights in defendant, and the deed (R. 277) does not purport to have any retroactivity. The deed is in much the same form as an American deed. It recites a cash consideration and a present conveyance. At that time the land was in the United States and the Governor of Chihuahua was without a vestige of authority to do anything affecting it. This is important because under the Texas Law of Trespass to try title, if the defendant is shown to be a trespasser, plaintiff may recover on a mere showing of prior possession. Therefore, it is no answer to say if we do not have title why are we concerned about defendant's title. Both lower Courts committed fundamental error when they held that the Governor of Chihuahua, Mexico, could lawfully convey to the defendant the land in controversy at a time when it was in the United States.

Grants made by the Spanish authorities in territory which, upon the subsequent settlement of a disputed boundary line, was determined to belong to one of the United States, are void. *Robinson vs. Minor,* 10 Howard 627, cited in Moore's Int. Law Digest I, 746.

The provision in a treaty that the inhabitants of a ceded territory shall be protected in the free enjoyment of their property, does not extend to mere *inchoate* rights which are of imperfect obligation and affect only the conscience of the new sovereign. *Dent vs. Emmeger,* 14 Wall. 308.

And it was fundamental error for the Circuit Court of Appeals to hold the principle that the law goes with the land when it is transferred from one soverignty to another

has no application to the transfer by the movement of the river of a few acres of land from one sovereignty to another.

Spanish laws prevailing in Louisiana before its cession, and affecting titles to land there, *must be judicially noticed* by the Court. *Their existence is not matter of fact to be tried by a jury. U. S. vs. Turner,* 11 Howard 663; *U. S. vs. Chavez* (1895) 159 U. S. 452, cited in Moore, Int. Law Digest, I, 333.

The record in this case is in shape for this Court to pass on every issue involved. A jury was waived. The District Court filed a memorandum opinion, entered a judgment, and later filed findings of fact and conclusions of law. All the rulings of the Court in the progress of the trial of the cause that were against the interests of the plaintiffs to-wit: the rulings admitting in evidence the alleged muniments of title of the defendant, were excepted to at the time and duly presented by a bill of exceptions and may be reviewed upon appeal. There is no Statute or rule of Court requiring such rulings to be assigned as error. It was contended by the plaintiffs that the muniments of title of the defendant were null and void and of no force or effect, and the action of the Court in upholding their validity was assigned as error, and if they were invalid of course they were not admissible in evidence for any purpose. In other words, when we assign as error the holding by the Trial Court that the instruments were valid, the assignment and the error necessarily include the collateral error committed in admitting invalid instruments.

The wholesomeness of the Mexican Agrarian Law and the expropriation proceeding thereunder has no bearing on any issue in this case, and is no concern of the courts. The question is whether the Mexicans tracked the law in plundering the plaintiffs. So far as sympathy is concerned, at

least as much could be said for the plaintiffs as for the defendant, if it had any proper place in this proceeding. There is nothing in the record to indicate that the plaintiffs did not acquire the land in controversy in a lawful manner and for an adequate consideration, and they certainly lost it through a species of governmental theft.

CONCLUSION

It is respectfully submitted that the interpretation of the Mexican Law by the lower Courts was incorrect and deprived plaintiffs of valuable rights to which they were entitled, and therefore, certiorari should be granted.

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